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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LIDIA IBARRA, Defendant and Appellant.	C080231 (Super. Ct. No. 12F00954)

A jury convicted defendant Lidia Ibarra of furnishing methamphetamine. (Health & Saf. Code, § 11379, subd. (a).) (*People v. Ibarra* (Feb. 18, 2015, C072556) [nonpub. opn.] (*Ibarra*).) The trial court sustained three prior prison term allegations (Pen. Code, § 667.5, subd. (b))[1] and sentenced defendant to nine years in state prison (*Ibarra, supra*, C072556). We affirmed the conviction but reversed the prison term priors for

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[1] Undesignated statutory references are to the Penal Code.

insufficient evidence and remanded for specific additional findings as to one requirement. (*Ibarra*, *supra*, C072556.) On remand, defendant asked the court to find two of the prior prison term allegations not true, because their underlying convictions were previously reduced to misdemeanors pursuant to section 1170.18. The trial court agreed to "hear this argument even though it's not the subject of remittitur," and subsequently declined to find "that the granting in [*sic*] the petitions under Prop 47 here precludes the application of these additional prison terms." The trial court then found "beyond a reasonable doubt that . . . the [three] prior one-year allegations . . . are true." The court announced it was "prepared to sentence [defendant] to one year consecutive sentence for each of the prior convictions. . . . consecutive to the term that [it] had previously imposed for the charged offenses" and did so.

On appeal, defendant contends that the two prison priors based on what are now misdemeanor convictions should have been stricken. As we will explain, the determination that the underlying prior convictions were felonies was correct at the time it was made, and the trial court had no jurisdiction to revisit that determination on remand. That previous determination did not become unauthorized merely because at the time of remand we held that one component of the true findings as to the three prison priors had yet to be adjudicated and remanded for that narrow purpose. Accordingly, we affirm.

BACKGROUND

We dispense with the facts of defendant's crime as they are unnecessary to resolve this appeal.

Defendant's three prison term priors were based on a 2006 conviction for first degree burglary (§ 459), and convictions for possession of a controlled substance (Health & Saf. Code, § 11377) in 1995 and 1999. In the appeal from her conviction, defendant asserted there was insufficient evidence she was not subject to the five-year "washout" provision in section 667.5, subdivision (b). (*Ibarra*, *supra*, C072556.) The People

agreed. (*Ibid*.) We reversed the prison term priors and remanded the matter to the trial court. (*Ibid*.) Our remittitur read in pertinent part:

"The trial court's true findings on defendant's three prior prison terms are reversed. The matter is remanded to the trial court for the limited purpose of affording the People the opportunity to establish that defendant did not remain free for five years of both prison custody and a new felony conviction as required by Penal Code section 667.5, subdivision (b). The People have 90 days from remittitur to calendar a hearing for this purpose.

"If the People meet their burden, the trial court shall reenter the judgment and sentence, as modified. If the People fail to timely calendar the necessary hearing within 90 days from remittitur, or, at said hearing, fail to prove defendant's prior prison terms as detailed *ante*, the trial court is directed to dismiss the allegations and resentence defendant accordingly." (*Ibarra, supra*, C072556.)

The People calendared a hearing on the prison term priors, which was held on September 11, 2015. Before the hearing, the 1995 and 1999 possession priors were reduced to misdemeanors pursuant to section 1170.18. Defendant claimed the trial court could not sustain the 1995 and 1999 prison priors because they were misdemeanors. As we have described above, the trial court disregarded the limited nature of the remittitur and entertained the argument. It concluded that the reduction of the crimes underlying two of the three prior prison terms to misdemeanors had no effect on their use in proving the prior prison terms at issue. The court imposed a sentence of three years for the three prison priors, and "confirmed" the remaining six years of the sentence already imposed, for a total term of nine tears state prison.

DISCUSSION

Proposition 47 made "certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by specified ineligible defendants." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Convicts currently serving or who have

completed a sentence for a crime subject to Proposition 47 may petition to have the offense reduced to a misdemeanor and to be resentenced, if applicable. (§ 1170.18, subds. (a), (b), (g).) "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k) ("subdivision (k)").)

"Imposition of a sentence enhancement under . . . section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]" (*People v. Tenner* (1993) 6 Cal.4th 559, 563 (*Tenner*).)

Defendant contends the trial court could not make true findings on remand as to the 1995 and 1999 prison priors because the convictions underlying them were, prior to the hearing on remand, reduced to misdemeanors pursuant to section 1170.18. She argues that the original sentence automatically ceased to exist at the point of reversal and remand; therefore, any subsequent adjudication was necessarily done anew. The authority she cites on this point does not support her argument.

The relationship between Proposition 47 and the prior prison term enhancement is currently in flux. Whether subdivision (k) operates retroactively to invalidate prison priors imposed before the effective date of Proposition 47 is an issue pending before the California Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011.) The Second Appellate District, Division Seven, has determined a defendant sentenced *after* Proposition 47's effective date is not subject to an enhancement for prison term prior if the felony on which it was based has been

reduced to a misdemeanor under section 1170.18. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746-748.) This court recently held in *People v. Kindall* (2016) 6 Cal.App.5th 1199 (*Kindall*) that where a felony has been reduced to a misdemeanor *prior to that felony's adjudication* as the underlying felony of a prior prison term enhancement, it cannot be deemed a previous felony conviction under *Tenner*. (*Kindall, supra,* at pp. 1203-1205.)

Thus, under *Kindall,* had the trial court regained jurisdiction to determine anew whether the now-reduced crimes underlying the prior prison terms were felonies, its finding that they were indeed felonies, as required by *Tenner*, was incorrect. However, the trial court lacked jurisdiction to deviate from our limited remand. Thus any purported finding that it made regarding the felonious nature of the now-misdemeanor priors was made without jurisdiction and is void.

"When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. [Citations.]" (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655.) There are no exceptions to this rule. Thus, "[o]n remand, the trial court must adhere to the reviewing court's directions even if the lower court is convinced the appellate court's decision is wrong or has 'been impaired by subsequent decisions.' [Citation.]" (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 860.)

Our decision in *People v. Dutra* (2006) 145 Cal.App.4th 1359 (*Dutra*) illustrates this point. The defendant in *Dutra* was convicted of manslaughter and accessory after the fact to murder, and sentenced to an upper term of 11 years in state prison. (*Id*. at p. 1363.) While the defendant's appeal was pending, the United States Supreme Court held, in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*), a defendant has a Sixth Amendment right to jury trial on sentencing factors. (*Dutra, supra,*

at p. 1363.) The Attorney General conceded at oral argument that *Blakely* applied to the determinate sentencing law (DSL), and, based on this contention, we affirmed the conviction but reversed the sentence. (*Dutra, supra,* at p. 1363.) We gave the People the option of accepting a midterm sentence or " 'a remand for a sentencing trial.' " (*Ibid.*) The People chose the sentencing trial. (*Id*. at p. 1364.) After our initial decision in *Dutra,* but before the scheduled sentencing trial, the California Supreme Court decided in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) that *Blakely* did not apply to the DSL. (*Dutra, supra,* at p. 1363.) The trial court found that *Black* vitiated our remittitur, and reimposed the upper term without holding a sentencing trial. (*Dutra, supra,* at p. 1364.)

On appeal, the People argued that the trial court's decision was correct as an exception to the law of the case doctrine. (*Dutra, supra,* 145 Cal.App.4th at pp. 1367-1368.) While an appellate court's determination of a legal issue normally governs all future litigation of that case, there is an exception to this rule for intervening changes in the law, which the People argued applied here. (*Id.* at pp. 1364-1365, 1367-1368.) We rejected the People's argument because "the rule requiring a trial court to follow the terms of the remittitur *is jurisdictional*, unlike the law of the case doctrine." (*Id*. at p. 1367, original italics.) Even though the order for a new trial was in hindsight incorrect, the trial court was nonetheless obligated to comply with the remittitur. (*Id.* at pp. 1368-1369.)[2]

Here, the situation is slightly different because the prior adjudication of the underlying crimes as felonies remained valid; it was not "in hindsight incorrect," as we

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[2] While our decision to accept the Attorney General's concession on the applicability of *Blakely* was eventually vindicated by the United States Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856], at the time *Dutra* was decided, *Black* had not been overruled in *Cunningham*, and was therefore binding on California courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

have described. Although it would have been incorrect if made at the time the trial court purported to make it on remand, that action was taken without jurisdiction, as we have described. The previous determination did not become an unauthorized sentence, as defendant argues in her briefing, when we held that one component of the true findings as to the three prison priors had yet to be adjudicated and remanded for that narrow purpose. Only one component of the necessary findings was incomplete. The completed findings were not subject to readjudication.

Our remittitur to the trial court was clear in this case. If the People chose to, the trial court would hold a new hearing on the prison prior limited to a single issue, whether defendant did not remain free of prison custody and a new felony conviction as required by section 667.5, subdivision (b). That issue addresses the fourth factor of the prior prison term as described in *Tenner*, the "washout" provision. The trial court's findings at the initial sentencing as to the first three *Tenner* factors, that defendant had been convicted of a felony, served prison time on it, and had completed her sentence, were not disturbed when we reversed the true finding on the prison priors. These findings were correct at the time they were made. Further, all four *Tenner* findings, including the nonapplication of the washout provision found (for the first time) by the trial court on remand, were true and correct at the time of defendant's original sentence. This was true even though the fourth and final finding, dealing with the washout provision, was not *made* until later. The second sentencing hearing merely supplemented the original. It did not nullify and replace it.

Citing *People v. Burbine* (2003) 106 Cal.App.4th 1250, defendant claims "the remittitur implicitly carried with it the plenary authority to resentence defendant regardless of the outcome of the trial." Not so. *Burbine* addressed the trial court's authority to resentence the defendant when a single count is reversed and the case remanded for resentencing. (*Id.* at p. 1253.) It did not address the trial court's authority on a limited remand like the case before us. "This case presents the converse question:

whether, after the reversal of one count of a felony conviction, the defendant's aggregate prison term must be decreased upon resentencing." (*Ibid*., italics omitted.) Cases are not authority for propositions not considered. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) In light of the limited remand in this case, *Burbine* is irrelevant.

Defendant does not contest the trial court's findings as to the "washout" provisions. The trial court's findings regarding the washout provisions completed the required findings under *Tenner*, as we ordered on remand, and resulted in true findings as to the three prison priors. We disregard the remainder of the trial court's findings and actions, as they were made without jurisdiction. The reimposition of the nine-year sentence was proper.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.